Supreme Court, U.S.
FILED
MAY 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1422

In the Supreme Court of the United States

OCTOBER TERM, 1979

AZZARELLI CONSTRUCTION CO. and
JOHN F. AZZARELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 612 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1979. A petition for rehearing was denied on February 12, 1980. The petition for a writ

of certiorari was filed on March 13, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury concerning the interstate commerce element of the offense.

2. Whether out-of-court statements by petitioners' co-conspirators were properly admitted into evidence.

STATEMENT

On June 6, 1978, a federal grand jury sitting in the United States District Court for the Eastern District of Illinois charged four corporations and two individuals with one count of violating Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to rig bids on three highway-construction projects let by the State of Illinois and with twelve counts of mail fraud in violation of 18 U.S.C. 1341.[1] At the close of trial, the jury convicted petitioners on all counts. John Azzarelli, part owner and vice president of the Azzarelli Construction Company, was fined $25,000 and sentenced to a suspended two-year prison term

[1] Indicted with petitioners were three other corporations—Loitz Brothers' Construction Company, Kankakee Paving Corp. and Central States Engineering, Inc.—and one other individual, Joseph Azzarelli. Loitz and Kankakee subsequently entered pleas of guilty. Central States was acquitted by the jury of the mail-fraud charges but was convicted of the Sherman Act violation. Joseph Azzarelli was acquitted by the jury of all charges (Pet. App. 2a).

and three years' probation after serving the first ninety days. The company was fined $200,000 on the Sherman Act count and a total of $12,000 on the mail-fraud counts (Pet. App. 1a-2a).

1. Petitioners do not challenge the sufficiency of the evidence presented against them at trial. Briefly, the evidence established that petitioners met with the other defendants and allocated three highway-construction projects among themselves. Pursuant to the agreement, petitioners were the only bidders on one of the projects and were awarded that job. In return, they did not submit a bid on the second project and submitted a complementary bid on the remaining project[2] (Pet. App. 10a). Thus, as the court of appeals noted (*id.* at 4a), this case is a "classical example" of bid rigging.

Petitioners' primary defense at trial was that the conspiracy was not in the flow of and did not affect interstate commerce. The parties stipulated that certain witnesses, if called, would testify that $120,000 worth of bitumen made from crude oil purchased from an out-of-state source and $3,880 worth of bitumen purchased from an out-of-state source were "sold and delivered for use on and was used in the" project allocated to petitioners (Tr. 484). Petitioners' evidence established that the bitumen was mixed with sand and gravel to make bituminous concrete before being used in the project. The district court per-

[2] The term "complementary bid" means one that is intentionally higher than the designated low bid.

mitted petitioners to argue to the jury that the conspiracy had no impact on interstate commerce because the flow of interstate commerce had terminated when the bitumen had been mixed with sand and gravel (Tr. 1967). The court then instructed the jury that it had to determine whether petitioners' activities were in the flow of commerce and, if so, whether the flow had terminated, or whether petitioners' activities substantially affected interstate commerce (Pet. App. 14a-15a). The jury convicted petitioners.

2. The court of appeals affirmed petitioners' convictions. The court initially rejected petitioners' argument "that a *per se* violation [of the Sherman Act] can occur only in a 'flow' of commerce situation, and not in an 'affecting' commerce situation" (Pet. App. 5a). Turning to petitioners' argument that the flow of commerce had terminated when "crude oil and asphaltic cement [bitumen] were combined to make bituminous concrete," the court concluded, in any event, that the "mere change in the form of the commodity" was insufficient to terminate the flow of interstate commerce (*id.* at 6a-8a). Moreover, the court concluded that the conspiracy had substantially and adversely affected interstate commerce by increasing the cost of the highway projects (*id.* at 7a-8a).

After rejecting petitioners' interstate-commerce arguments, the court found that certain co-conspirator declarations had been properly admitted into evidence and that the evidence was sufficient to sustain

the jury's verdict (Pet. App. 9a-11a). Finally, the court sustained petitioners' convictions on the mail-fraud counts (*id.* at 11a-12a). Petitioners do not challenge their convictions on the mail-fraud counts in this Court.

ARGUMENT

1. Contrary to petitioners' contention (Pet. 8-11), the court of appeals did not impermissibly relax the flow-of-commerce method of proving interstate commerce by adopting a "nexus to commerce" approach and by "discarding" the concept that the flow of commerce can terminate. Rather, viewing the facts of this case, the court below concluded that on the evidence and instructions in this case the jury properly concluded that the flow of commerce was not terminated by the mixing of bitumen with sand and gravel. This decision was correct.

A product that moves in interstate commerce pursuant to special order continues in the flow of commerce until its final destination. See, *e.g.*, *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943); *United States* v. *South Florida Asphalt Co.*, 329 F.2d 860 (5th Cir.), cert. denied, 379 U.S. 880 (1964); *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F.2d 128 (9th Cir. 1960). The fact that the product is altered, or mixed with or imbedded in other materials, does not necessarily halt the flow of interstate commerce.[3] Indeed, on facts

[3] See, *e.g.*, *Rasmussen* v. *American Dairy Association*, 472 F.2d 517 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973) (ingredients from out of state combined with local water and

similar to this case, the Fifth Circuit concluded that mixing bitumen purchased out of state with sand and rock did not terminate the flow of interstate commerce. *Hardrives Co.* v. *East Coast Asphalt Corp.*, 329 F.2d 868, 870 (5th Cir.), cert. denied, 379 U.S. 903 (1964); *United States* v. *South Florida Asphalt Co., supra*, 329 F.2d at 865-866.[4]

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processed to produce filled milk product); *Mississippi River Corp.* v. *Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972) (portland cement mixed with water); *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F.2d 674 (5th Cir.), cert. denied, 382 U.S. 959 (1965) (raw milk from out of state mixed with other milk to standardize butter fat content, pasteurized, in some cases homogenized, and bottled); *Plymouth Dealers' Ass'n of Northern California* v. *United States, supra* (assembly of automobiles within the state using parts and equipment shipped across state lines); *United States* v. *Richter Concrete Corp.*, 328 F.Supp. 1061 (S.D. Ohio 1971) (cement mixed with other ingredients to make ready-mix concrete).

Contrary to petitioners' argument (Pet. 10), the decision below does not conflict with *United States* v. *Flom*, 558 F.2d 1179 (5th Cir. 1977). *Flom* recognized that alterations do not necessarily halt the flow of interstate commerce but held that mere receipt of steel from out-of-state does not alone mean that the shipment is in the flow of commerce.

[4] Unlike *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), relied on by petitioners (Pet. 9-10), the court of appeals did not rely on the theory that a flow of commerce can be established in highway construction cases merely because highways are instrumentalities of interstate commerce. Rather, the court expressly noted that materials used in the construction projects had been purchased from out-of-state sources (Pet. App. 6a-8a). It further concluded that the evidence supported a finding that the conspiracy had a substantial effect on interstate commerce (*id.* at 8a-9a).

In this case, petitioners stipulated that both bitumen from an out-of-state source and bitumen containing oil from an out-of-state source were purchased for use in and were in fact used in the construction of the project allocated to petitioners (Tr. 484). They then presented evidence and argued to the jury that the flow of commerce had terminated. The district court properly let the jury decide whether the mixing of the bitumen with sand and gravel was sufficient to terminate the flow of interstate commerce (Pet. App. 14a). The district court's jury instruction on this issue, when viewed as a whole and within the context of the entire trial, "was not misleading and contained an adequate statement of the law to guide the jury's determination." *United States* v. *Park*, 421 U.S. 658, 675 (1975); see also *Kentucky* v. *Whorton*, 441 U.S. 786 (1979).[5] There is no need for this Court to review this essentially factual issue that the jury resolved adversely to petitioners.

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[5] Petitioners' proposed additional jury instructions on the interstate commerce issue (Pet. App. 16a-17a) were both unnecessary and erroneous. They were unnecessary because the instructions given by the district court, when viewed in the context of the entire trial, were adequate. *United States* v. *Park, supra.* They were erroneous because they contained inaccurate statements of law or did not reflect the evidence that had been introduced in the case. For example, petitioners' proposed instruction No. 51 referred to warehousing. There was no evidence of warehousing in this case. Indeed, petitioners stipulated that bitumen purchased out-of-state was intended for use in and was in fact used in the project allocated to them. Thus, even if the bitumen had been "ware-

2. Petitioners contend that the district court's instructions and the court of appeals' opinion allowed the jury to apply the *per se* rule to presume an effect on interstate commerce (Pet. 11-13).[6] This contention is erroneous.

The district court instructed the jury that interstate commerce is an essential element of a Sherman Act offense (Pet. App. 14a). In addition to the flow theory, it charged that this element may be satisfied where intrastate transactions "substantially affect interstate commerce" (*ibid.*), and that if the restraint were a local one, such an effect on interstate commerce had to be "direct and substantial and not merely [an] inconsequential remote or fortuitous" effect (Pet. App. 15a). Only after the district court instructed the jury that it first had to determine whether petitioners' activities were in the flow of or affected commerce did the court also instruct the

housed," it still would have been in the flow of commerce. See *Walling* v. *Jacksonville Paper Co., supra*, 317 U.S. at 569.

[6] Petitioners' argument has undergone a change between their appeal and this petition. On appeal, petitioners argued that the *per se* rule is inapplicable to affecting-commerce cases (Pet. App. 4a-5a). The court of appeals rejected this argument noting that it is without authority and clearly untenable (*ibid.*). The argument confuses the question of jurisdictional scope of the Sherman Act with the question of whether the conduct is a substantive violation of the Act (*ibid.*). Accordingly, the district court properly rejected petitioners' proposed instruction No. 47 which incorrectly states that the *per se* rule applies only where the interstate commerce element is satisfied under the flow of commerce theory (Pet. App. 16a).

jury that "[c]ertain types of conduct," including bid rigging, are regarded as *per se* illegal (Pet. App. 15a). Thus, under the district court's instruction taken as a whole, the jury could return a verdict of guilty if it concluded (i) that petitioners' activities were in or affected interstate commerce and (ii) that petitioners had in fact conspired to rig bids. This instruction is clearly correct. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

In affirming the district court, the court of appeals did not hold that the *per se* rule presumptively establishes the requisite impact on interstate commerce. To the contrary, the court correctly distinguished between the jurisdictional element of interstate commerce and the substantive question whether an unreasonable restraint exists (Pet. App. 4a-5a). The court of appeals found a substantial effect on interstate commerce in this case because the bid-rigging agreement directly affected the cost of the highway projects and thus affected the prices of commodities purchased out of state and used in those and other highway projects. This analysis is identical to that employed by this Court.[7]

[7] The jurisdictional question was resolved "as a matter of practical economics" which showed that a not insubstantial effect on interstate commerce was involved. *McLain* v. *Real Estate Board of New Orleans, Inc.*, No. 78-1501 (Jan. 8, 1980), slip op. 12; *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 745 (1976); *Burke* v. *Ford*, 389 U.S. 320, 321-322 (1967); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229 (1948).

3. Petitioners also challenge the admissibility into evidence of certain co-conspirator declarations. They first contend (Pet. 15) that the court below essentially held that this Court's holding in *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942), that the existence of a conspiracy must be proven by independent evidence and not solely by the declarations of alleged co-conspirators, was overruled by the adoption of Fed. R. Evid. 104(a).[8] The court of appeals, however, held that the co-conspirator declarations were admissible under its prior decision in *United States* v. *Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1978) (Pet. App. 9a-10a). In *Santiago*, the court held that prior to admitting co-conspirator declarations into evidence the government must show by a preponderance of independent evidence that a conspiracy existed, that the defendant and declarant were members of the conspiracy, and that the statements were made in the course of the conspiracy.[9] *Santiago* does not permit "bootstrapping"—the consideration of the co-conspirator statements themselves in deciding the question of admissibility.[10] Thus, the question whether bootstrapping is permissible is not presented by this case.[11]

[8] Rule 104(a) provides that preliminary questions concerning the admissibility of evidence should be determined by the court and that in making the determination the court is not bound by the rules of evidence except those with respect to privileges.

[9] This procedure has been accepted by the First, Second, Third, Fourth and Eighth Circuits. *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States* v. *Stanchich*, 550 F.2d 1294, 1299-1300 (2d Cir. 1977); *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977); *United States* v. *Stroupe*, 538 F.2d 1063 (4th Cir. 1976).

Petitioners further contend (Pet. 15) that the district court should have evaluated "both credibility and weight of the evidence" and made express findings on the record in concluding that the conspiracy existed and that they had participated in it. As we have noted, however, both the district court and the court of appeals concluded that the government had produced sufficient independent evidence proving the

[10] The Sixth Circuit allows bootstrapping. *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, No. 79-830 (Feb. 19, 1980). *United States* v. *Enright*, 579 F.2d 980, 985 n.4 (6th Cir. 1978), cited by petitioners, raised the question rhetorically but did not decide it. *United States* v. *Martorano*, 557 F.2d 1, 12 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978), allows bootstrapping but admonishes that the co-conspirator statements themselves should be given little weight. See also *United States* v. *Richman*, 600 F.2d 286, 297 (6th Cir. 1979).

[11] There was ample independent evidence to support admission of the co-conspirator statements. The testimony of Lawrence Loitz concerning his meetings with John Azzarelli set forth the details of the conspiracy and established Azzarelli's participation (Tr. 228-254). This testimony was corroborated by that of the other government witnesses who themselves were the out-of-court declarants (*e.g.*, Tr. 655-659, 757, 1033-1035, 1054-1056) and circumstantial evidence in the form of the various companies' activities including Azzarelli's, in preparing for the bidding (*e.g.*, Tr. 648-655, 1049-1054, 1587-1588, compare Gov't Exhs. 84, at 4 and 85A with Gov't Exh. 20 showing last minute increases on the bid amounts by Azzarelli; Pet. App. 10a n.14) and the actual bids themselves (Gov't Exh. 2, at 24-26).

existence of the conspiracy and petitioners' participation in that conspiracy (see Pet. App. 9a-11a). Thus, petitioners, who do not challenge either the sufficiency of the evidence or the credibility of any witness in this Court, could not have been prejudiced by the failure of the district court to make the findings requested by petitioners. Indeed, neither the Federal Rules of Evidence nor any prior decision of this Court requires a district judge to make such findings on the record prior to permitting the jury to consider co-conspirator testimony.[12] Therefore, there is no need for this Court to consider this issue in this case.

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[12] The general rule is that the district judge is not required to make any express findings on the record so long as the record reflects his belief that the government has satisfied its burden of proof on the co-conspirator issue. See, *e.g.*, *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 457-460 (3d Cir. 1979), cert. denied, No. 79-679 (Jan. 14, 1980); *United States* v. *Green*, 523 F.2d 229, 233 n.4 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

In this case the record reflects that the district court believed there was sufficient independent evidence to allow the co-conspirator statements to go to the jury. Contrary to petitioners' assertion (Pet. 14), the district court made an express determination that the *Santiago* standard for admission of co-conspirator declarations was satisfied in this case (Pet. App. 18a-19a). Review of this factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 320237 309